

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2002-147-S - ORDER NO. 2003-10

JANUARY 7, 2003

IN RE:	Application of Carolina Water Service, Inc.)	ORDER DENYING
	for Approval of an Agreement with the Town)	APPLICATION SEEKING
	of Lexington for Bulk Service Collection)	APPROVAL OF
	from the I-20 and Watergate Sewage)	PROPOSED CONTRACT
	Collection Facilities located in Lexington)	
	County, South Carolina)	

INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (“Commission”) on the application filed by Carolina Water Service, Inc. (“CWS”) seeking approval of a proposed agreement with the Town of Lexington. The proposed agreement, known as “Wastewater Treatment and Transportation Service Agreement” (“Agreement”), provides for the Town of Lexington to provide bulk service treatment and collection from CWS’s I-20 and Watergate sewer collection facilities. Further, CWS and the Town of Lexington have reached a compromise agreement, for which CWS seeks approval should this Commission not approve the Agreement, which provides for the sale of CWS’s Watergate sewer system to the Town of Lexington for the sum of \$2,524,500.00 and approval of the 208 Plan Amendment designating the I-20 wastewater treatment facility as a permanent treatment facility. The application was filed pursuant to S.C. Code Ann. Section 58-5-210 (1976); 26 S.C. Code Regs. 103-503 and 103-541

(1976 and Supp. 2001); and Commission Order No. 93-402 in Docket No. 91-641-W/S dated May 11, 1993, and Commission Order No. 94-484 in Docket No. 93-738-W/S dated May 31, 1994.

The Commission's Executive Director instructed CWS to publish a prepared Notice of Filing regarding the application. Further, the Executive Director instructed CWS to furnish by U.S. Mail a copy of the Notice of Filing to all customers which would be affected by the application. CWS complied with the instructions of the Executive Director and provided affidavits of publication and mailing to attest to compliance. The purpose of the Notice of Filing was to advise interested persons of the nature of the application and to provide directions on the manner and time in which interested persons could seek to participate in any proceedings regarding the application. Following the publication and mailing of the Notice of Filing, Petitions to Intervene as formal parties of record were received from the Consumer Advocate for the State of South Carolina; Midlands Utility, Inc.; and Brenda Bryant.¹

Two hearings on the application were noticed and held. First, a night hearing was held on September 17, 2002, at the Oak Grove Elementary School, which is located in or adjacent to CWS's I-20 service area. The purpose of the night hearing was to afford interested customers of CWS the opportunity to present their views relative to the application to the Commission. The hearing on the application was concluded on September 19, 2002, with the remainder of the hearing being conducted in the Commission's hearing room located in the Commission's offices at Synergy Business

¹ A Petition to Intervene Out of Time was received from the South Carolina Department of Health and Environmental Control ("SC DHEC"), but the Commission denied SC DHEC's Petition to Intervene Out of Time by Order No. 2002-604, dated August 27, 2002.

Park, Saluda Building, 101 Executive Center Drive, Columbia, South Carolina. The formal parties of record presented their respective cases at the hearing on September 19, 2002. At both sessions of the hearing, the Honorable Mignon Clyburn, Chairman, presided. William F. Austin, Esquire, E. Crosby Lewis, Esquire, and Kelly Rainsford, Esquire represented CWS. Elliott F. Elam, Jr., Esquire represented the Consumer Advocate for the State of South Carolina. John F. Beach, Esquire represented Midlands Utility, Inc. Brenda Bryant appeared pro se. Florence P. Belser, Deputy General Counsel, represented the Commission Staff. CWS called as witnesses Robert G. Burgin, Jr., Susan Fortino, Clifford O. Koon, Jr., Gary D. Shambaugh, and Lowell C. (“Butch”) Spires. Keith Parnell testified on behalf of Midlands Utility, Inc., and Brenda Bryant testified on her own behalf. The Commission Staff presented the testimony of Jeff deBessonnet, a subpoenaed witness.

FINDINGS OF FACT

Having observed the witnesses at the hearings and having examined the testimony and exhibits presented, taking into account the burden of persuasion by the parties, the Commission makes the following Findings of Fact by a preponderance of the evidence:

1. CWS is a wholly-owned subsidiary of Utilities, Inc. which is incorporated under the laws of the State of Illinois and is certified to do business in South Carolina.
2. CWS owns and operates wastewater treatment facilities and sewer systems in the I-20 and Watergate Subdivisions and is a public utility as defined by S.C. Code Ann. Section 58-5-10(3) (Supp. 2001) and as such is subject to the jurisdiction of the

Commission pursuant to S.C. Code Section 58-5-210 (1976) and other relevant statutory provisions and other applicable rules and regulations of the Commission.

3. The Central Midlands Council of Governments (“COG”) is authorized pursuant to Section 1288 of the Federal Water Pollution Control Act (i.e., 33 U.S.C.A. Section 1251 et seq., also known as the “Clean Water Act”) to prepare an area wide waste management plan, also known as a 208 Plan.

4. In 1993, the COG amended its 208 Plan by adopting the COG 12 and 14 Mile Creek 1993 208 Plan Amendment, which encompasses the areas served by the I-20 and the Watergate sewer systems in Lexington County.

5. Also, in 1993 and under the amended 208 Plan, the COG was to select a Designated Management Agency (“DMA”) to carry out the amended regional plan in the 12 and 14 Mile Creek area. Several entities, both public entities and private utilities, sought this designation. In soliciting support for its selection, the Mayor of Lexington and the Lexington Town Council by letter dated January 8, 1993, and sent to the COG and the South Carolina Department of Health and Environmental Control (“SC DHEC”), committed that if the Town of Lexington were selected as the DMA that it would not charge existing customers for the cost of the system.

6. In conformance with its duties under 33 U.S.C.A Section 1288, the COG, acting through its Environmental Planning Advisory Committee (“EPAC”) requested confirmation as to how the Town of Lexington and the joint applicant, the City of West Columbia, proposed to handle several aspects of the Plan, including the rates with which the Town of Lexington proposed to finance the project.

7. In response to the EPAC's request, the Town of Lexington and the City of West Columbia prepared and sent to the EPAC a letter dated February 17, 1993, in which, among other commitments, they promised to treat all five existing non-industrial dischargers fairly and equitably and to charge reasonable rates. The issue of the rates to be charged to those non-industrial dischargers that became a part of a Regional Sewer System was one of the considerations being addressed by this February 17, 1993, response. In addition to fair and equitable treatment, the Town of Lexington and the City of West Columbia stated that "[b]ulk users would not be charged a tap fee for existing customers." This statement confirmed the statements from the January 8, 1993 letter in which the Mayor of Lexington and the Lexington Town Council stated that

[w]e have a workable plan to fund the permanent solution. This is a combination of escrowed tap fees, the pre-construction sale of taps and SC State Revolving Loan Fund. We intend for the permanent solution to be funded by the future users of the system and not by current customers or the citizens of Lexington County (a real possibility if the County System provides the service as they have the authority to issue General Obligation Bonds to be paid off by all the citizens in the county and not just the affected area). We do not have the authority to issue General Obligation Bonds for sewer service.

These referenced letters dated January 8, 1993, January 29, 1993, and February 17, 1993, are part of the 208 Plan Amendment.

8. After receipt of the commitments contained in the letters referenced in Findings of Fact Nos. 5, 6, and 7, the COG designated the Town of Lexington and the City of West Columbia as Joint Designated Management Agencies to construct and operate the 12 and 14 Mile Creek Regional Sewer System ("Regional Sewer System").

9. Thereafter, the City of West Columbia withdrew as one of the Joint Designated Management Agents, and the Town of Lexington was allowed to continue as the sole DMA.

10. The South Carolina Department of Health and Environmental Control (“SC DHEC”), which also has authority over CWS in that SC DHEC regulates CWS’ wastewater discharges from CWS’s I-20 and Watergate treatment facilities through the issuance to CWS of National Pollutant Discharge Elimination System Permits (“NPDES Permit”), and pursuant to the 208 Plan, added a condition to CWS’s I-20 and Watergate NPDES Permits that provided that CWS would be required to interconnect these two systems to the Regional Sewer System once notified by SC DHEC that the Regional Sewer System was available for the interconnection.

11. On May 11, 1998, the COG and SC DHEC entered into a Memorandum of Agreement whereby the COG was empowered to review compliance with the 208 Plan and to certify conformance to SC DHEC.

12. CWS requested re-issuance of its NPDES Permit for the Watergate treatment facility as CWS’s NPDES Permit was scheduled to expire on September 30, 1998 or within 120 days after notification that the Regional Sewer System was available.

13. In March, 1999, CWS requested re-issuance of its I-20 NPDES Permit which was scheduled to expire in September, 1999, or within 90 days after notification that the Regional Sewer System was available.

14. With the exception of the completion of that portion of the 12 Mile Creek line that would be used to transport the waste from the Town of Lexington’s Coventry

Woods Wastewater Treatment Facility, the Town of Lexington has substantially completed all of the Regional Sewer System. That portion of the Regional Sewer System which could serve CWS's I-20 Systems was permitted to operate by SC DHEC on or about April, 1999, and that portion of the Regional System that could serve CWS's Watergate System was permitted on or about July, 1999.

15. In June, 1999, pursuant to an inquiry from SC DHEC, the staff of the COG, as part of the NPDES Permit re-issuance certification process, certified to SC DHEC that CWS's I-20 system was not in conformance with the 208 Plan.

16. On August 18, 1999, CWS petitioned the technical subcommittee of the COG, known as EPAC, and requested that EPAC recommend to the COG that the COG reverse its staff's June certification of non-conformance and hold that CWS was in conformance with the amended 208 Plan on the grounds that CWS had been requesting, without success, information from the Town of Lexington necessary for negotiating a proposed agreement since November, 1996.

17. The Town of Lexington did not give CWS the necessary information needed to determine whether the proposed rates were reasonable. Further, without the terms of an agreement, CWS could not obtain a ruling from the Commission regarding the agreement. Based on these grounds, CWS requested that the EPAC recommend to the COG that the COG hold CWS in conformance with the 208 Plan for a period of time to allow CWS to obtain the rates and data necessary to negotiate a connection agreement with the Town of Lexington and to request approval from the Commission.

18. The EPAC recommended to the COG that the COG grant CWS's request, and on September 23, 1999, the COG granted CWS's request, reversed the staff's earlier decision of non-conformance, and held that CWS was in conformance with the 208 Plan until November 22, 1999.

19. On June 22, 2000, after determining that the parties were at an impasse in the negotiations, the COG requested that the Town of Lexington provide CWS with "a proposed agreement" which CWS would submit to the Commission for a ruling as to whether CWS should enter into the Town of Lexington's agreement. The COG again extended the 208 Plan conformance certification for CWS for a period of three (3) years or for a period ending six months following the Commission's final order on the proposed connection agreement, whichever date should first occur.

20. CWS filed an application seeking Commission approval of the proposed agreement, and that application was assigned to PSC Docket 2000-425-S. After a public hearing and the filing of testimony and exhibits and one week before the scheduled hearing in that docket, the Town of Lexington and CWS negotiated a compromise agreement. The compromise agreement reached by the Town of Lexington and CWS provided for an amendment to the 208 Plan.

21. The COG agreed to amend the 208 Plan in accordance with the compromise agreement. Under the compromise agreement, CWS's I-20 treatment facility would become a permanent regional wastewater treatment facility and would be updated to tertiary treatment with capacity expanded by 190,000 gallons per day. CWS would sell

the Watergate wastewater collection system² to the Town of Lexington, and the rates charged by the Town of Lexington to those customers would be capped at \$34.00 per residential equivalent for a period of three years. The Town of Lexington's Coventry Woods treatment plant would remain open and in operation for a period of five years.

22. The application for a 208 Plan Amendment to account for the substantive terms of the compromise agreement was filed with the COG. The COG approved the Amendment, but SC DHEC would not approve the COG's action and refused to submit the Amendment to the EPA. The COG, CWS, and the Town of Lexington appealed the SC DHEC action to the Administrative Law Judge Division, and the case is pending before Judge John Geathers.

23. In a matter collateral to the case of the Compromise Agreement pending before Judge Geathers, Judge Ralph K. Anderson, III issued an order requiring CWS to present to the Commission the Agreement that is presently before the Commission.

24. The Agreement presently before the Commission for consideration is the same agreement submitted to the Commission in Docket 2000-425-S, except for the rates contained in the Agreement. The rate for treatment in the Agreement in the instant docket is \$3.45 per thousand gallons. Previously, in September, 1999, the Town of Lexington proposed wholesale rates of \$2.52 per thousand for the Watergate customers and \$1.51 per thousand for the I-20 customers. Those rates were withdrawn, and the Town of Lexington, on February 10, 2000, proposed an "all-in-rate" of \$4.26 per thousand gallons.

² According to witness Koon, the Watergate Wastewater collection system is composed of the lines, pipes, mains, easements, valves, pumps, and service rights.

25. CWS is of the opinion that the rate of \$3.45 per thousand is not an appropriate rate for the agreement because the terms of the rate violate the promises that were made and given to CWS in 1993. Specifically, the proposed rates would require the CWS ratepayers to subsidize the regional system, and the rates do not reflect the cost of serving the CWS customers.

26. Based upon the current rate contained in the Agreement and CWS's approved collection system charge established by the Commission by Order No. 94-484 and Order No. 2001-887 in Docket No. 93-738-W/S and 2000-207-W/S, respectively, CWS has estimated that the average monthly sewer bills will change from the currently-approved flat-rate of \$28.86 per month to approximately \$48.25 per month for CWS's I-20 customers and to \$45.63 per month for CWS's Watergate customers.

27. As is, the Town of Lexington's rate study supports a rate of \$3.38 per thousand gallons, not the \$3.45 per thousand rate offered to CWS. The wholesale rate includes an extra strength surcharge, and there is no basis on which to assume that CWS's flow into the regional system would justify an extra strength surcharge.

28. The Town of Lexington's rate study is based upon plant function only and does not consider the total and available capacity in the regional system. Therefore, wholesale customers are charged for facilities which are not utilized to provide their service, and wholesale customers are paying for facilities and capacity costs for future growth.

29. The Town of Lexington's rate study used to develop the \$3.45 per thousand rate was developed by an allocation of conveyance cost, and the \$3.45 per

thousand rate was developed without including flows or projections of flows from the Watergate and I-20 customers. Leaving out the flows generated by the Watergate and I-20 customers results in an overstated, or higher, rate.

30. In the Town of Lexington's rate study, approximately eight million dollars is projected to be spent on the regional system for the period 2002 through 2007. The regional system is inclusive of the Town of Lexington's own collection system, operations, and treatment plant. The costs for the capital improvements listed in the Town of Lexington's rate study are for capacity and for future growth, such as line extensions, renewals, and replacements, within the Town of Lexington's own collection system. The capital improvements listed in the Town of Lexington's rate study neither provide additional benefit nor are the improvements required to provide service to the CWS customers.

31. The Agreement has no formula or basis for calculating future rates and no guarantees with regard to future service. Further, the Agreement requires approval from the Town of Lexington before the CWS systems can be sold and also requires approval from the Town of Lexington before CWS could request to expand its service territory. In short, the Agreement is structured to provide the Town of Lexington with the ultimate control of the contract and the system.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter by virtue of S.C. Code Ann. Section 58-5-210 (1976) and other relevant code sections and 26 S.C. Regs. 103-503 (1976) and 103-541 (Supp. 2001).

2. 26 S.C. Code Regs. 103-541 provides

[n]o utility shall execute or enter into any agreement or contract with any person, firm, partnership, or corporation or any agency of the Federal, State or local government which would impact, pertain to, or effect said utility's fitness, willingness, or ability to provide sewer service, including but not limited to the collection or treatment of said sewerage, without first submitting said contract in form to the Commission and obtaining approval of the Commission.

3. The Commission concludes that the Agreement is not in the public interest and should therefore be denied. If the Agreement was approved, the proposed rate to be charged to the individual customers would be excessive and would result in "rate shock" for the customers in the I-20 and Watergate service areas. The evidence from this proceeding has shown that if the Agreement is approved, customers in the I-20 service area would see an average monthly charge of \$48.25, which is an average increase of \$19.39 per month per customer. If the Agreement is approved for the customers in the Watergate service area, those customers would see an average monthly charge of \$45.63, which is an average increase of \$16.77 per month per customer.

4. We further conclude that the Agreement, including the proposed rate, to be unfair, unsupportable, and unreasonable because the record demonstrates that the proposed rate contained in the contract is not reflective of the true allocated cost of serving the CWS customers. Under the Agreement and proposed rate of \$3.45 per thousand gallons, the customers of CWS would be charged for facilities which are not utilized to provide their service, as well as charged for facilities and capacity for future growth. Importantly, the proposed wholesale rate would require the CWS customers to

subsidize the services provided to the Town of Lexington's current and future customers. Thus, the Agreement includes a rate which is in direct conflict with and contrary to the commitment made by the Town of Lexington in 1993, namely that the Town of Lexington would not charge existing customers for the cost of the Regional System. While the record contains no proof of the true allocated costs for CWS to tie into the Regional System, the record does contain evidence that the proposed rate of \$3.45 per thousand gallons does reflect that wholesale customers such as CWS would be paying for facilities which are not utilized to provide the service to the wholesale customer as well as paying for facilities and capacity costs for future growth. The Town of Lexington is asking for CWS as a wholesale or bulk customer to support and subsidize capacity that is there for future growth and expansion. Such a scenario is not in the public interest and is not in the interest of the CWS ratepayers. This position is inconsistent with the accounting standards for regulated utilities. To subject the customers of CWS to such improper accounting would be inconsistent with the workings of this Commission.

5. Finally, we deny the Agreement because it contains various provisions which are inconsistent with the laws and regulations governing public utilities which are under the jurisdiction of the Commission. In particular, Article IV, Section 4.01 and Article IV, Section 4.11 would cede to the Town of Lexington determinations which are the province of this Commission. This Commission has been granted its regulatory authority over public utilities by the South Carolina General Assembly. This Commission cannot allow parties to a contract to attempt to take away the authority granted to this Commission.

6. We also deny the Compromise Agreement offered by CWS and the Town of Lexington. As with the Agreement, there is no evidence to indicate that the proposed rate under the Compromise Agreement is reflective of the true allocated costs to serve the CWS Watergate customers. Further, while the rate under the Compromise Agreement is capped for three years, there is no evidence to support that the rate after the initial three year period would be reflective of the actual costs to serve those customers.

ORDER

Based upon the above-stated Findings of Fact and Conclusions of Law, it is hereby ordered that:

1. The application of CWS for approval of a proposed Wastewater Treatment and Transportation Service Agreement with the Town of Lexington is denied.
2. CWS's request for approval of a Compromise Agreement with the Town of Lexington, including the sale of the Watergate wastewater collection system to the Town of Lexington, is denied.

3. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Mignon L. Clyburn, Chairman

ATTEST:

Gary E. Walsh, Executive Director

(SEAL)